Supreme Court, U.S.
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No. ~~98-105~~

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ADAPTIVE POWER SOLUTIONS, LLC,
Petitioner,

v.

HUGHES MISSILE SYSTEMS COMPANY
AND RAYTHEON COMPANY,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly applied well-settled antitrust doctrines in holding (1) that the rule of reason, rather than the *per se* rule, applied to respondents' alleged refusal to deal and (2) that, under the rule of reason, petitioner failed to establish the requisite injury to competition.

RULE 29.6 STATEMENT

Respondent Raytheon Company has no parent companies or non-wholly owned subsidiaries. Respondent Hughes Missile Systems Company is now known as Raytheon Missile Systems Company and is a wholly owned subsidiary of Ratheon Company. Raytheon Missile Systems Company has no non-wholly owned subsidiaries.

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Respondents Hughes Missile Systems Company and Raytheon Company respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Adaptive Power Solutions, LLC.

STATEMENT

1. Respondents Raytheon and Hughes are the two manufacturers of advanced medium range air-to-air missiles ("AMRAAMs") for sale to the Department of Defense. Pet App. 3a. One of the components of the AMRAAM missile is an internal power supply known as the "A3." *Id.*

In June 1995, petitioner acquired the assets of Raytheon's sole A3 supplier in a foreclosure sale. Pet App. 3a. After petitioner informed Raytheon that it would not provide any

A3s to Raytheon unless Raytheon agreed to a substantial price increase, Raytheon awarded its A3 contract to a new entrant into the A3 business. *Id.* at 4a. At approximately the same time, petitioner unsuccessfully offered to sell A3s to Hughes, which unlike Raytheon already had another supplier under contract, for a lower price. *Id.* at 3a-4a.

Petitioner sued respondents in April 1996, alleging, *inter alia*, a violation of Section 1 of the Sherman Act. Pet App. 4a. Specifically, petitioner alleged that it was unsuccessful in its attempt to sell A3s to Hughes because Raytheon convinced Hughes to join it in refusing to deal with petitioner "for the purpose and with the intent of driving [petitioner] out of the market for the manufacture of A3's." *Id.* Petitioner alleged that it went out of business due to its inability to sell A3s to Raytheon and Hughes. *Id.*

2. The district court granted summary judgment to respondents on petitioner's Section 1 claim on the ground that, under the rule of reason, there was no injury to competition. Pet App. 16a.

3. The court of appeals affirmed. The court first held that the district court had correctly held that the *per se* rule, which conclusively presumes certain categories of restraints of trade to be illegal because they virtually always restrict competition, did not apply to the restraint alleged in this case. Pet App. 5a-7a. The court of appeals then applied traditional rule of reason analysis and determined that the district court had correctly found that there was no injury to competition. The court of appeals thoroughly reviewed the evidentiary record relating to the chronology of suppliers entering, leaving and remaining in the market:

> In June 1995, [petitioner] bought Sigmapower's assets and labelled itself a competitor. So, according to [petitioner], there continued to be two competitors: [petitioner] and Oeco. In September of 1995,

> [petitioner] "was driven" out of the A3 manufacturing market and sold its A3 production equipment to SoraPower. The next month, October 1995, [Raytheon] awarded ST Keltec, a new entrant into the market, a contract to produce A3s. ST Keltec actually began producing A3s sometime later in 1995. It is not clear from the evidence when ST Keltec became "qualified" [by the DOD to product A3s]. The other new entrant, SoraPower, approached Hughes in March or April 1996 to try to obtain a contract to supply Hughes with A3s, but was not successful. Oeco continued to manufacture and sell A3s all along.

Pet. App. at 9a-10a. Based on this review, the court of appeals determined that, due to the demonstrated ease of entry in the A3 market, respondents' actions had not caused any injury to competition and, in fact, competition may have actually increased. *Id.* Moreover, the court of appeals agreed that the district court "got it right" when it concluded that petitioner's claim of injury to competition made "no economic sense." *Id.* at 13a.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari is based entirely on the premise that the courts below erroneously applied well-settled principles of antitrust law to the particular facts of this case. Petitioner presents no unsettled questions of law or actual conflicts among federal appellate decisions, petitioner's contentions are meritless, and the questions presented are entirely factbound, particularly in light of the unique characteristics of the industry involved. The petition should be denied because it meets none of the criteria traditionally considered by this Court in granting discretionary review. *See* this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

1. Petitioner's principal contention is that the court of appeals erred in concluding that the *per se* rule did not apply to respondents' alleged refusal to deal. *See* Pet. 6-8. The court of appeals relied on this Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), in refusing to apply the *per se* rule on the ground that the alleged group boycott by Raytheon and Hughes did not disadvantage a competitor. Pet. App. 6a. Petitioner acknowledges that *Northwest Wholesale Stationers* is "the seminal decision addressing when *per se* analysis should be applied to group boycotts" (Pet. 6), but contends that the court of appeals "misconstrue[d]" that decision by "adding a formalistic gloss thereon." *Id.* at 6-7.

But the court of appeals merely followed the general rule that application of the *per se* rule is unwarranted where, as here, the challenged conduct was not directed at a competitor. *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) ("the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"). Petitioner does not take issue with that general rule, but argues only that the court of appeals should have made an exception to it under the particular circumstances of this case. Such a factbound contention regarding the application of settled law does not warrant this Court's review.

2. Petitioner next complains that the court of appeals erred in holding that the alleged group boycott was not an unlawful price-fixing conspiracy. Pet. 7-8. As the court of appeals explained, "[t]he defect in this argument is a factual one" because this case "has nothing to do with a price-fixing conspiracy." Pet. App. 7a. Review of that factual determination is unwarranted. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

3. Petitioner's final argument is that respondents' market power is a substitute for proof of actual anticompetitive effects under the rule of reason. Pet. 9-10. This contention is based on this Court's observation that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Fed'n of Dentists*, 476 U.S. at 460-61 (citations omitted). Petitioner would turn this well-settled antitrust principle on its head. While it makes perfect antitrust sense that a full-blown analysis of a defendant's market power is not necessary if the plaintiff can show actual detrimental effects on competition, it would make no legal or economic sense to allow a showing that respondents have market power -- and therefore have the *potential* to injure competition -- to defeat a showing that there have been no *actual* anticompetitive effects.

Contrary to petitioner's contention (*see* Pet. 9-10), the decision below does not conflict with *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996), which also affirmed a grant of summary judgment on the ground that the plaintiff failed to prove injury to competition. The *Orson* court stated, in *dicta*, that market power can serve as a substitute for actual anticompetitive effect when, "[d]ue to the difficulty of isolating the market effects of the challenged conduct," proof of actual anticompetitive effect is "impossible to make." *Id.* at 1367. Regardless of the correctness of that statement, it has no application here. In this case, proof of actual anticompetitive effects was not impossible to make. Rather, as the courts below recognized, respondents affirmatively showed that there were *no* anticompetitive effects. Pet. App. 9a-10a, 16a.

4. This case presents a textbook example for the application of the rule of reason. The antitrust laws are for the benefit of competition, not competitors. The purpose of the *per se* rule is to characterize certain circumstances as *always* anticompetitive. Where, as here, there have been no anticompetitive effects as a result of the alleged restraint, the *per se* rule should not apply, nor should proof of market power be sufficient to show an injury to competition. The courts below engaged in a straightforward rule of reason analysis of the alleged restraint and correctly held, based on well-established antitrust principles, that there was no injury to competition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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